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No. 88-1569

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD H. AUSTIN, Michigan Secretary of State, and FRANK J. KELLEY, Michigan Attorney General,
Appellants,

v.

MICHIGAN STATE CHAMBER OF COMMERCE,
Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR AMICI CURIAE NATIONAL ORGANIZATION FOR WOMEN GREENPEACE ACTION NATIONAL ABORTION RIGHTS ACTION LEAGUE NATIONAL RIGHT TO WORK COMMITTEE PLANNED PARENTHOOD FEDERATION OF AMERICA THE FUND FOR THE FEMINIST MAJORITY IN SUPPORT OF APPELLEE

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QUESTION PRESENTED

Whether the Sixth Circuit correctly interpreted the Supreme Court's opinion in *FEC v. Massachusetts Citizens for Life* to find that the provision of a state law, which prohibited corporations from making independent expenditures in support of or in opposition to candidates, was unconstitutional as applied to a non-profit ideological corporation that posed no threat of corruption.

PARTIES TO THE PROCEEDING

Richard H. Austin, Michigan Secretary of State

Frank J. Kelley, Michigan Attorney General

Michigan State Chamber of Commerce

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This *amici curiae* brief is submitted in support of appellee Michigan State Chamber of Commerce. By letters filed with the Clerk of the Court, appellants and appellee have consented to the filing of this brief.

INTEREST OF THE AMICI CURIAE

The *amici curiae* are non-profit voluntary corporations organized for various purposes, including the providing of certain services and the promotion of various political, ideological, and environmental issues.

The National Organization for Women ("NOW") is a non-profit membership corporation exempt from federal income taxes pursuant to 26 U.S.C. §501(c)(4). The purpose of NOW is to take action to bring women into full participation in the mainstream of American society now, exercising all the privileges and responsibilities thereof in truly equal partnership with men. NOW's policy is set by a delegated membership conference. Only "natural persons" can be members of NOW.

Greenpeace Action is a non-profit corporation, established in 1987 to perform education, advocacy and grassroots lobbying in the United States on issues relating to the protection and preservation of environmental quality. Specifically, Greenpeace Action engages in campaigns to stop the threat of nuclear war, to protect the environment from nuclear and toxic pollution, to encourage the use of safe, renewable energy sources and to halt the needless slaughter of marine mammals and other endangered species. It is exempt from federal income taxes as a social welfare organization pursuant to 26 U.S.C. §501(c)(4).

The National Abortion Rights Action League ("NARAL") is a non-profit corporation dedicated to keeping abortion safe, legal, and accessible through participation in electoral politics (including independent expenditures), lobbying, litigation, and grassroots

organizing. NARAL has 300,000 members in 34 state affiliates and the national organization. NARAL is exempt from federal income taxes as a social welfare organization pursuant to 26 U.S.C. §501(c)(4).

The National Right to Work Committee ("NRWC") is an ideological, non-profit, membership corporation exempt from federal income tax pursuant to 26 U.S.C. §501(c)(4). (Its articles of incorporation and bylaws were amended to provide for membership following the litigation in *FEC v. NRWC*, 459 U.S. 197 (1982).) NRWC's purpose is to promote voluntary unionism. While not established by any business corporation or labor union, NRWC does have corporate, as well as individual, members which contribute to its support. NRWC has long taken an interest in the free speech and association rights of non-profit, ideological organizations and their supporters. For example, NRWC was the driving force which caused the Federal Election Commission, in January 1988, to open a still-pending project to amend its regulations to conform to the *MCFL* decision.

Planned Parenthood Federation of America ("Planned Parenthood") is a non-profit charitable corporation organized under the laws of the State of New York. It is the oldest and largest family planning organization in the United States. Although Planned Parenthood's tax-exempt status under 26 U.S.C. §501(c)(3) bars its participation in electoral politics, Planned Parenthood believes that the First Amendment guarantees it the right to do so through a separate organization not subject to the same restrictions. Planned Parenthood moreover believes that the First Amendment guarantees such a separate non-profit ideological organization the right to participate in the

electoral process by making independent expenditures out of general treasury funds.

The Fund for the Feminist Majority is an organization dedicated to encouraging social and political change in American society. It actively works to achieve the enhancement, protection and enforcement of the civil rights of women and to remove barriers to equal economic and political opportunity. The Fund for the Feminist Majority is incorporated under the laws of the District of Columbia as a non-profit corporation and is exempt from federal taxation pursuant to 26 U.S.C. §501(c)(4).

SUMMARY OF ARGUMENT

In *FEC v. Massachusetts Citizens for Life* ("*MCFL*"), 479 U.S. 238 (1986), this Court determined that 2 U.S.C. §441b, which prohibits corporations or labor unions from making expenditures "in connection with" federal elections, is unconstitutional as applied to non-profit corporations "formed to disseminate political ideas, not to amass capital." *MCFL*, 479 U.S. at 259. This Court began with the premise that the prohibited activity was political speech and therefore at the core of First Amendment protection. Political speech can be prohibited by an arm of the government only to the extent that the prohibition is narrowly tailored to meet a compelling governmental interest. In *MCFL* this Court found that the compelling governmental interest served by the prohibition of political speech by corporations was the prevention of corruption caused by the use of wealth amassed in the economic marketplace in the political marketplace. The Court further found that this interest was not served by prohibiting the political

speech of a non-profit incorporated voluntary political association and therefore found that Section 441b could not be constitutionally applied to MCFL.

Since *MCFL* was decided two and a half years ago, the Federal Election Commission ("FEC") has consistently sought to narrow, modify, or even nullify that ruling, with which it clearly disagrees. The FEC has repeatedly attempted to argue that the ruling is limited to a certain minuscule class of non-profit corporations. Indeed, the FEC has argued that it is the details of MCFL's organization—its small size, its lack of formality, its refusal to accept corporate contributions—which required the ruling. In so doing the FEC has attempted to obscure the central aspect of the *MCFL* ruling: that ideological, non-commercial and non-profit corporations cannot constitutionally be prohibited from electoral speech. The FEC has mechanistically focussed on one aspect of *MCFL*—the Court's recognition of MCFL's refusal to accept corporate contributions—and has claimed that ideological corporations receiving even a *de minimis* amount of corporate contributions are not entitled to First Amendment protection and therefore are subject to the restrictions of the law. In so doing, the FEC attempts to impute constitutional significance to the size of an organization or to the exact nature of its bookkeeping. In this case, the FEC has sought to take advantage of the Court's review of a state law similar to Section 441b in order to seek to persuade the Court to restrict its *MCFL* ruling.

In the case at bar, the statute at issue is Mich. Comp. Laws Ann. §169.254(1), which contains a prohibition analogous to that of Section 441b. The Sixth Circuit found that the statute cannot be constitution-

ally applied to a non-profit, ideological corporation which presents no danger of corruption. The philosophy of the organization involved, the Michigan State Chamber of Commerce, is the promotion of business. The organization also permits corporate members. For these reasons, the State of Michigan, and the FEC, which has filed an *amicus curiae* brief herein, claim that the organization is not entitled to the constitutional protection articulated in *MCFL*.

The *amici curiae* filing the instant brief are all non-profit, ideological, incorporated voluntary associations who are not subject to the control of any business corporations or labor unions. Indeed, the *amici* derive the bulk of their income from contributions by individuals. The *amici curiae* file this brief in opposition to the State of Michigan and the FEC because they believe that the FEC's interpretation of *MCFL* is unconstitutional and impossible to apply. If the FEC's attempt to rewrite *MCFL* were to be successful, that decision would be rendered constitutionally meaningless.

In particular, the FEC's emphasis in its *amicus curiae* brief on the size of organizations and on the receipt of any income from a corporate source as the "bright-line" distinguishing corporations protected by *MCFL* from corporations which are to be treated as commercial enterprises is constitutionally flawed. First Amendment protection should not depend upon the size of an entity. Neither should it depend upon adherence or non-adherence to formalities that are easily manipulated. The issues, instead, are whether or not the entity in question is genuinely a commercial enterprise or was organized for reasons other than economic profit, and whether the entity is a conduit

for business or labor union influence. The *amici curiae* believe that this is a factual matter that can be resolved by a trier of fact without resort to irrational arbitrary rules such as those favored by the FEC.

ARGUMENT

THE COURT OF APPEALS CORRECTLY RULED THAT RESTRICTING INDEPENDENT EXPENDITURES IN SUPPORT OF OR IN OPPOSITION TO CANDIDATES BY NON-PROFIT INCORPORATED VOLUNTARY POLITICAL ASSOCIATIONS IS UNCONSTITUTIONAL

A. Non-Profit Voluntary Organizations Have a Constitutional Right to Communicate with the Public About Important and Controversial Political Issues and About Candidates for Public Office

Non-profit voluntary political associations, whether incorporated or not, have a clear First Amendment right to make statements to the public about issues of importance and to thereby try to change public opinion and public policy. For this reason, judicial holdings in the area of election law carefully balance the interests served by the election provision in question against the First Amendment right to freedom of expression. This Court held, in *Buckley v. Valeo*, 424 U.S. 1 (1976), that the Federal Election Campaign Act and the regulations enforcing it must be read *narrowly*, since provisions that are imprecise or are read too broadly would tend to chill the exercise of free speech and thus violate the First Amendment.

More recently, this Court has repeatedly affirmed that expenditures in connection with elections "produce speech at the core of the First Amendment." *FEC v. NCPAC et al.*, 470 U.S. 480 (1985); *FEC v. MCFL*, 479 U.S. at 251. When a group spends money

to advocate its political position, the First Amendment clearly protects the activity. "Money is speech and speech is money." *Buckley v. Valeo*, oral argument, transcript at 24 (November 10, 1975), cited in *FEC v. National Organization for Women* ___ F.Supp. ___ (D.D.C. May 11, 1989, Civ. Action 87-2269).

First Amendment protection clearly applies to organizations with the same force as to individuals. In *FEC v. NCPAC, supra*, this Court forcefully rejected the notion that the corporate form of organizations "diminishes . . . entitlement to First Amendment protection." Membership organizations, this Court pointed out, are:

> mechanisms by which large numbers of individuals of modest means can join together in organizations which serve to "amplif[y] the voice of their adherents." *Buckley v. Valeo*, 424 U.S. at 22; *NAACP v. Alabama*, 357 U.S. 449, at 460 (1958); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295-296 (1981).

470 U.S. at 494. Thus, the First Amendment right of an organization carries the collective weight of the constitutional privilege of all its individual members or supporters.

B. Content-based Restrictions of Electoral Speech are Constitutional only if they are Narrowly Drawn to Meet the Compelling Government Interest of Preventing Corruption

When a statute burdens First Amendment rights, it must meet a compelling state interest. *Williams v. Rhodes*, 393 U.S. 23, at 31 (1968); *NAACP v. Button*, 371 U.S. 415, 438 (1963). In *FEC V. NCPAC*, this

Court strongly reaffirmed its prior holdings that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." 470 U.S. at 496-497. Regulations that burden First Amendment rights must, furthermore, be "narrowly tailored to the evil that may legitimately be regulated." 470 U.S. at 496.

In *FEC v. NCPAC*, this Court also observed that the evil to be avoided by election law is the corruption of public officials by funds received from supporters. Funds spent *independently* of candidates do not pose that same risk. See also *FEC v. NRWC*, 459 U.S. 197, 207-208 (1982). "[R]estrictions on contributions require less compelling justification than restrictions on independent spending." *MCFL*, 479 U.S. at 259-260. Thus, restrictions on independent expenditures, which are funds spent on communicating with the public, require a greater showing that they are narrowly drawn to meet a compelling government interest.

C. The *MCFL* Description of Non-Profit Advocacy Corporations Must be Reaffirmed in Light of the Constitutional Requirement that Government Prohibition of Speech be Narrowly Drawn to Meet a Compelling Government Interest

Applying these principles, this Court held in *MCFL*, *supra*, that the Section 441b restriction on independent corporate spending is unconstitutional as applied to non-profit corporations "formed to disseminate political ideas, not to amass capital." *MCFL*, 479 U.S. at 259. In that case, a non-profit group organized for political purposes made independent expenditures expressly advocating the election or defeat of certain

candidates for public office. In so doing, MCFL violated Section 441b of the Federal Election Campaign Act.

This Court found that the prohibition in Section 441b was an infringement upon constitutionally protected speech without a compelling justification. The principal concerns of the law were political corruption and "the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace." *MCFL*, 479 U.S. at 257. This Court further found that political voluntary associations do not present such dangers even if they do enjoy certain legal protections of the corporate form. Corporations with "features more akin to voluntary political associations than business firms", 479 U.S. at 263, cannot be required to comply with the requirements of Section 441b as to independently spent funds. This Court observed also that the only reason for distinguishing corporate entities from all others was:

> . . .the desire for a bright-line rule. This hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom.

479 U. S. at 263. This Court acknowledged the Congressional concern that funds accumulated in the economic marketplace not give an unfair advantage in political life as a justification for applying Section 441b to "*commercial enterprises.*" *MCFL*, 479 U. S. at 263. A non-profit ideological group does not present that danger when it spends its money independently of candidates on political messages to the general public. Accordingly, restricting the speech of

such groups does not narrowly further the governmental interest of preventing corruption. Indeed, the relative wealth of such groups reflects their political popularity. Unlike commercial corporations, advocacy groups are conduits for individual political speech and receive contributions for that purpose.

At issue in the case at bar is the Sixth Circuit's interpretation of the three-prong test set forth by this Court in *MCFL* for ideological non-profit organizations whose independent expenditures cannot be constitutionally restricted by Section 441b. The three criteria set forth by this Court are, generally, as follows:

(1) the corporation was founded to promote political ideas, not to make money (i.e., it is "ideological");

(2) the corporation has no shareholders or others with a claim on its earnings; and

(3) the corporation is not controlled by a profit-making corporation or labor union in the sense of serving as a conduit for the funds of such organizations.

MCFL, 479 U.S. at 264. The above three criteria must be viewed in light of the overall structure of First Amendment analysis. The central premise, always, must be that regulation of speech is disfavored. The burden is on the government to show that prohibition of electoral speech can survive constitutional scrutiny because it is narrowly drawn to meet a compelling government interest.

The first criterion above serves the purpose of assuring that corporations which have the potential of

corrupting the political process by infusing the proceeds of business ventures into politics are barred even from independent political expenditures. To meet this requirement, an organization must not only be non-profit, but must have as its central purpose the promotion of ideas, as distinguished from the accumulation of capital. The Sixth Circuit found that the appellee "exists for purely ideological purposes." Whether or not that is the case is a factual matter that can be ascertained by a trier of fact.

The second criterion above serves the purpose of assuring that ideas and politics, not business, enter into decisions made by individuals to join or to leave the organization in question.

The third criterion is designed to avoid the possibility that a non-profit, ideological entity meeting the above two requirements will merely be a "conduit" for "direct spending that creates a threat to the political marketplace." In other words, the non-profit and ideological status of a corporation cannot simply be a sham front to conceal business or labor union activity in politics. MCFL met this requirement because it was not established by a business corporation or labor union and because it did not even accept contributions from such entities. There are other ways to meet this requirement. Consistent with the First Amendment analysis set forth above, all entities which can show that they meet requirements (1) and (2) above and for whom the government cannot show that they are conduits for the infusion of corporate or labor union funds into the political process must be exempt from the requirements of Section 441b.

D. The FEC's *Amicus Curiae* Brief Misconstrues the *MCFL* Holding by Interpreting it as Requiring that Corporations Meet Various Criteria that are Irrelevant to First Amendment Analysis

The FEC appears to have overlooked the fact that the *MCFL* decision, and the criteria for corporations set forth therein, are based on First Amendment law. Instead, the FEC views the factual circumstances and accidents of MCFL's organization as a regulatory framework which must be met in every particular detail by organizations asserting their First Amendment privilege. A corporation, in the FEC's view, must be exactly like MCFL in numerous irrelevant ways in order to merit the agency's blessing for constitutional protection.

The *amici curiae* respectfully submit that the FEC has stood constitutional analysis on its head by arguing that only a limited class of ideological non-profit groups merits First Amendment protection. As we noted above, government regulation of speech must be narrowly drawn to meet a compelling government interest. Therefore, the burden is on the government to show that organizations must be regulated. The burden is not on the organizations to show that they are exactly like MCFL and therefore merit First Amendment rights.

The fallacy of the FEC's analysis is clear when its position is reviewed in detail. The FEC argues that accepting any contributions, however small, from any corporate or labor union entity removes an organization's right to First Amendment protection. See FEC's *amicus curiae* brief, page 16, note 8. This is clearly incorrect. The purpose of the third prong of the *MCFL* test is to exclude entities that are *conduits*

for labor or business influence into the political process. Incidental (*de minimis*) amounts do not prove the existence of a conduit from business to politics. The absurdity of the FEC's position is evident when we consider that, according to the FEC, a single contribution from a single incorporated entity, such as a professional corporation, would remove an organization's right to First Amendment protection. The First Amendment does not cease to apply to an ideological entity simply because one of its members pays her or his membership dues through a professional corporation's checking account, instead of through a personal account, or simply because a corporation has contributed to it. According to the FEC's logic, MCFL itself would lose First Amendment protection if it received a single contribution from an individual who has incorporated her business as a professional corporation.

A clear example of the consequences of the FEC's position was presented in *FEC v. National Organization for Women*, ___ F.Supp. ___ (D.D.C. May 11, 1989), where the FEC argued that a non-profit ideological membership association which received an estimated 1% or less of its *total* budget from corporations or labor unions and only permitted "natural persons" to be members was not covered by the *MCFL* ruling. In that case, the FEC asked in discovery for an exact accounting of all funds received by the association from corporate or union entities, insisting that this data was crucial to determining whether or not NOW is covered by the constitutional protection of *MCFL*. This inquiry extended even to receipt of membership payment checks. NOW did not have this information available, since no current law

requires it to segregate funds received from corporations or labor unions. In order to have such information, NOW would have to review *each* membership payment and contribution to determine if it was made from a personal or a corporate (such as professional corporation) account.

If the FEC's limitation of *MCFL* is accepted by this Court, the agency will no doubt engage in similar discovery tactics elsewhere. Furthermore, if the FEC's argument prevails, non-profit ideological organizations will be required to engage in heretofore unnecessary, expensive accounting maneuvers as the price of constitutional protection. For example, in order to keep track of corporate contributions, advocacy organizations will have to review voluminous records; most of them receive small, numerous contributions. The extra burden imposed on the exercise of First Amendment rights will not reduce corruption. It will simply be an incentive for advocacy groups to become unincorporated associations.

The third prong of *MCFL* is not a mechanical process. Rather, it requires analysis to determine if an organization's treasury actually is a conduit for corporate or labor union power rather than "an indication of popular support for the corporation's political ideas." *MCFL*, 479 U.S. at 258. If the corporation receives its financial support from individual members and/or contributors and makes decisions in a manner that precludes corporate or union influence, for example, it is clearly not a conduit for business or union power, even if an occasional corporate contribution is received. The FEC's argument, both in its *amicus curiae* brief and in *FEC v. NOW*, *supra*, places a premium on mechanics at the cost of logic. The FEC's

proposed "test" for eligibility for *MCFL* protection would not disclose or prevent corruption and would not disclose or prevent corporate or union dominance of politics. It would only burden political speech.

Amicus curiae Common Cause supports the FEC's argument on the ground that it would establish a "bright-line" rule for conduct. See brief *amicus curiae* of Common Cause, pp. 20-26. As noted above, the laudable desire for "bright-line" rules does not justify constitutional infringement. *MCFL*, 479 U.S. at 263. Furthermore, as the *FEC v. NOW* discovery demonstrated, the FEC's position does not in reality provide a "bright-line" rule that is easy to administer, since it would necessitate voluminous review of membership checks and contributions. This review would itself pose First Amendment problems.

The FEC also argues that the *size* of a corporation is indicative of its entitlement to First Amendment protection under *MCFL*. See FEC's *amicus curiae* brief, pp. 8, 10-11. This argument is based, apparently, on the claim that large entities can afford a separate segregated fund; hence, they are not burdened by the requirements of Section 441b and do not need the First Amendment rights articulated in *MCFL*. The FEC apparently believes that larger entities are only entitled to a reduced standard of free speech. This again stands constitutional logic on its head. Constitutional rights are not based on size or wealth; these rights are absolute. The rich do not lose free speech rights simply because they can circumvent some restrictions by spending more money. Furthermore, the burden is not on the organization to show that it is burdened by regulation and merits constitutional protection. Rather, the burden is on the government to show that it needs the narrowly drawn regulation in order to further a compelling interest. *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 777 (1986).

Similarly, the FEC argues that the informality of an organization and its relative ability to establish a separate segregated fund is a yardstick of constitutional protection. See FEC's *amicus curiae* brief, pp. 8-9. *Amici curiae* note that in making this argument the FEC cites a portion of the *MCFL* opinion which was not joined by a majority of this Court. The FEC distorts *MCFL* by arguing that entities which are well-organized and administered deserve less constitutional protection than the inefficient. Furthermore, this standard for constitutional protection would be virtually impossible to apply in a consistent manner.

The FEC argues that the above "rules" are needed to prevent the abuse of *MCFL* by business corporations and labor unions. This is not the case. Abuses of *MCFL*, presumably occurring when an advocacy group is merely the conduit for labor or business interests, can be addressed by narrowly tailored regulations and precise factfinding. The law should not use an ax when a scalpel is available, especially where restrictions of free speech are concerned.

E. Conclusion

The Sixth Circuit opinion correctly interpreted *MCFL* to find that the provision of a state law, which prohibited corporations from making independent expenditures in support of or in opposition to candidates, was unconstitutional as applied to a non-profit ideological corporation that posed no threat of corruption.

Respectfully submitted,

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